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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION**

MEDIATEK INC.

Plaintiff,

v.

FREESCALE SEMICONDUCTOR, INC.

Defendant.

Civil Action No. 4:11-cv-05341 (YGR)

**MEDIATEK INC.'S OBJECTION TO
 REPLY EVIDENCE SUBMITTED BY
 FREESCALE (Civil L.R. 7-3(d)(1))**

Hon. Yvonne Gonzalez Rogers
 Hearing Date: December 10, 2013
 Time: 2:00 p.m.
 Courtroom: 5

DEMAND FOR JURY TRIAL

Pursuant to Civil L.R. 7-3(d)(1), Plaintiff MediaTek Inc. (“MediaTek”) submits this Objection to Reply Evidence in response to Defendant Freescale Semiconductor, Inc.’s (“Freescale’s”) Reply in Support of Its Motion for Summary Judgment (Dkt. No. 348).

I. INTRODUCTION

Freescale’s Reply responds to MediaTek’s identification of genuine issues of material fact by generating new “evidence” in the form of a declaration from Allen Wagner (Dkt. No. 348-23) (hereinafter “Wagner Decl.”) and raising new non-infringement arguments and alleged facts in a Separate Statement of Undisputed Material Facts (Dkt. No. 348-25) (hereinafter “SUMF”). Freescale could have and should have included this “evidence” in its Opening Brief. Instead, Freescale waited until its Reply to allege these purported new facts, leaving MediaTek no opportunity to respond. In addition, Freescale’s Reply fails to explain how this new “evidence” demonstrates the absence of genuine issues of material fact.

II. OBJECTIONS TO NEW EVIDENCE

A. Freescale’s Declaration from Allen Wagner Is Untimely and Should Be Stricken

MediaTek’s Opposition to Freescale’s Motion for Summary Judgment (the “Opposition”) regarding non-infringement of the i.MX6 products as to the ’845 patent demonstrated that genuine disputes of material fact exist. Among other evidence, MediaTek’s Opposition relied on the opening report of its expert, Dr. Krste Asanović, as well as testimony Freescale elicited from Dr. Asanović in his deposition. Freescale was fully aware of this evidence before filing its Motion for Summary Judgment, and had ample opportunity to address it in its Opening Brief – including, as needed, through a declaration from Allen Wagner. Instead, Freescale waited until its Reply to allege new facts from Mr. Wagner. For example, the Wagner Declaration includes additional allegations of fact regarding the structure and function of the FAST3 NIC-301 arbiter in the i.MX6DQ and i.MX6SDL products, as well as the PER2 NIC-301 arbiter in the i.MX6SL product. (*See* Dkt. No. 348-23 at 2-5.)

Before filing its Motion for Summary Judgment, Freescale knew MediaTek's infringement theories, and knew that MediaTek was relying (in part) on Mr. Wagner's testimony as supporting those theories. In particular, Freescale identified Mr. Wagner as its corporate designee to testify to the structure and operation of Freescale's accused products, including the i.MX6 products. MediaTek took Mr. Wagner's deposition on these topics on June 28, 2013. (Dkt. No. 222-17 (Deposition of Allen Wagner).) On August 23, 2013, MediaTek served the Opening Expert Report of Dr. Krste Asanović Regarding Infringement of U.S. Patent No. 6,738,845, in which Dr. Asanović demonstrated infringement by the i.MX6 products and cited Mr. Wagner's testimony. (*See* Dkt. Nos. 325-14, 325-15, 325-16 (Asanović Opening Report).) Freescale took the deposition of Dr. Asanović for 14 hours on October 17-18, 2013, and extensively deposed Dr. Asanović regarding his infringement opinions related to the i.MX6 products. (*See* Dkt. No. 325-18 (Excerpts of Deposition of Dr. Krste Asanović).)

Freescale's attempt to dispute the sworn testimony of Mr. Wagner and opinions of Dr. Asanović by waiting until its Reply to serve the Wagner Declaration only highlights the existence of genuine disputes of material fact. But in any event, the Wagner Declaration should be stricken as an improper attempt to introduce new evidence in connection with its reply papers. *See Contratto v. Ethicon, Inc.*, 227 F.R.D. 304, 308, n.5 (N.D. Cal, 2005); *In re High-Tech Employee Antitrust Litig.*, 11-cv-02509-LHK, 2013 WL 5770992, at *6, n.4 (N.D. Cal. Oct. 24, 2013).

B. Freescale's Disputes to MediaTek's Additional Material Facts Should Be Stricken

Pursuant to the Court's Standing Order in Civil Cases § 9(c)(2), MediaTek submitted a Responsive Separate Statement with its Opposition, setting forth its bases for disputing Freescale's "undisputed material facts," and identifying Additional Material Facts from the existing record in support of its Opposition. (Dkt. No. 325-8.) MediaTek's Additional Material Facts were based on the original infringement reports of its experts as well as deposition testimony of its own and Freescale's technical experts. (*Id.*) At the time Freescale filed its Opening Brief, Freescale was well-aware of MediaTek's infringement theories and MediaTek's

experts' opinions supporting the same. Nevertheless, in its Reply, Freescale attempts to respond to MediaTek's Additional Material Facts by describing its "disputes" with these additional material facts, often arguing new non-infringement theories that it failed to present in its Opening Brief.¹ (*See, e.g.*, Dkt. No. 348-25 (SUMF) at Additional Fact 77 (setting forth a non-infringement argument regarding the "memory unit" and "second slave subsystem" limitations of claim 1).) Freescale leaves only five of MediaTek's Additional Material Fact Nos. 74-103 undisputed, effectively acknowledging the existence of numerous genuine disputes of material fact. (*Id.* at Additional Fact Nos. 85, 86, 90, 91, 96). In responding to MediaTek's Additional Material Facts, Freescale also relies on the newly-introduced Wagner Declaration, and/or on paragraphs in the Rebuttal Report of Dr. Frank Vahid that it had not previously identified in Freescale's Opening Brief, introducing yet another level of material dispute. (*See, e.g., id.* at Additional Fact Nos. 75-82, 84.)

Wholly apart from the reality that Freescale's attempt to "dispute" MediaTek's Additional Material Facts actually supports MediaTek's arguments that there are genuine disputes of material fact, the new facts and theories identified in Freescale's Reply Statement of Material Facts (Dkt. No. 348-25) should be stricken as an improper attempt to introduce new evidence in connection with its reply papers. *Contratto*, 227 F.R.D. at 308, n.5; *In re High-Tech Employee Antitrust Litig.*, 2013 WL 5770992, at *6, n.4.

III. CONCLUSION

For the foregoing reasons, MediaTek respectfully requests that the Court strike Freescale's attempt to introduce new evidence in its Reply.

¹ The Court's Standing Order makes no provisions for the moving party to file a Reply Statement of Material Facts.

Dated: December 3, 2013

Respectfully submitted,
MEDIATEK INC.
By their attorneys,

/s/ James M. Dowd

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